Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TWIN CITY FIRE INSURANCE COMPANY, a corporation,

Plaintiff - Appellee,

v.

WAYNE ENNEN, dba Ennen and Associates; JULIA ENNEN, dba Ennen and Associates,

Defendants - Appellants,

AMERICAN MOTORISTS INSURANCE COMPANY, an Illinois corporation; UNITED STATES FIRE INSURANCE COMPANY, a New York corporation,

Defendants - Appellees,

and

WUNDA WEVE CARPETS, INC., a South Carolina corporation,

Defendant.

No. 02-15276

D.C. No.
CV-99-06031-AWI(SMS)

MEMORANDUM[*]

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted April 3, 2003
San Francisco, California

Before: **B. FLETCHER**, **KOZINSKI** and **TROTT**, Circuit Judges.

The insurance policies do not cover the judgment against Wunda Weve. California law resolves ambiguities in favor of the insured, see Reserve Ins. Co. v. Pisciotta, 30 Cal. 3d 800, 807-08 (1982), but the policies are not susceptible to the Ennens' construction. The judgment is indeed a liability Wunda Weve is "legally obligated to pay as damages." Vandenberg v. Superior Court, 21 Cal. 4th 815, 841 (1999) (internal quotation marks omitted). The policies' coverage, however, extends only to "injury arising out of . . . [m]isappropriation of advertising ideas or style of doing business." Wunda Weve's breach of an implied-in-fact contract was not misappropriation. "Misappropriation" is the wrongful taking of property, see Lebas Fashion Imps. of U.S.A., Inc. v. ITT Hartford Ins. Group, 50 Cal. App. 4th 548, 562 (1996), not mere failure to pay a debt for property lawfully obtained. Wunda Weve was held liable, not for wrongfully taking the Ennens' advertising idea, but for failing to perform its financial obligations.

That Wunda Weve may never have intended to perform is irrelevant.[1] Even if there was no meeting of the minds, see Desny v. Wilder, 46 Cal. 2d 715, 736-37 (1956), and even if Wunda Weve merely "should have known" the Ennens would construe its actions as assent, the fact remains that Wunda Weve was held liable only for failing to perform, not for fraud in the formation of the contract. Notably, the judgment was not for breach of an implied-in-law contract, a fiction the law imposes to rectify wrongful conduct. See Davies v. Krasna, 12 Cal. App. 3d 1049, 1054 (1970). Rather, Wunda Weve agreed—either intentionally or through conduct reasonably so construed—to pay money in return for an advertising idea. It was held liable only for its subsequent failure to do so.

The policy's exclusion exception for "misappropriation of advertising ideas under an implied contract" does not alter this result. Exceptions to exclusions do not create coverage. See Hurley Constr. Co. v. State Farm Fire & Cas. Co., 10 Cal. App. 4th 533, 540 (1992). The exception does imply that at least some breaches of implied contract are covered, but it does not imply that every such

[1] The claim of misappropriation was dismissed and not reinstated on appeal.

breach is covered. And, as relevant here, it does not imply that breach of an implied-in-fact contract is covered.

AFFIRMED.